

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
William L. Massey, Linda Breathitt,
and Curt Hébert, Jr.

Forward Contracting
by California Utilities

Docket No. PL01-2-000

ORDER ESTABLISHING CONFERENCE

(Issued December 18, 2000)

On December 8, 2000, Pacific Gas and Electric Company (PG&E) filed a letter requesting that the Commission convene, in a settlement conference format, at the earliest time possible, a meeting of the California investor-owned utilities, generators who supply California, marketers, the California Independent System Operator, and the office of Governor Davis to facilitate forward contracting by California investor-owned utilities. PG&E states that the presence of State of California participants should enable any contracts to be deemed "reasonable" for State ratemaking purposes.

We believe that the public interest will be served by immediately instituting settlement-type procedures with respect to the forward contracting issues raised by PG&E.¹ Accordingly, we direct the Commission's Chief Administrative Law Judge (Chief Judge) to convene a conference on these matters with the parties listed above on Tuesday, December 19 at 10 a.m. We request that all participants have persons present with authority to approve any matters agreed to. We urge the CPUC to participate in this conference. The Chief Judge shall have all powers and duties enumerated in Rule 603 of the Commission's Rules of Practice and Procedure.² We further direct the Chief Judge to report to the Commission the progress of the participants by December 30, 2000. We note that the Commission's order of December 15 on remedies for California wholesale electricity markets further discusses issues relevant to this conference.

The Commission orders:

¹Given the urgency of resolving forward contract issues promptly, we confine the scope of the conference to forward contracting only.

²18 C.F.R. § 385.603 (2000).

(A) The Chief Judge is hereby directed to convene a conference in Docket No. PL01-2-000, as discussed in the body of this order.

(B) The Chief Judge shall file with the Commission a status report on the discussions ordered herein, as discussed in the body of this order.

By the Commission. Commissioner Hébert dissented with a separate statement attached.

(S E A L)

David P. Boergers,
Secretary.

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HÉBERT, Commissioner, *dissenting*:

I find troubling the timing of this issuance. The Commission just issued an order, directing various remedies for California wholesale electric markets, one business day ago (late last Friday). It is filled with many directions and suggestions. Market participants and governmental officials need at least some time to read through them all and to determine an appropriate response.

I understand the urgency of market reform in California. I also understand the value of all market participants coming together and reaching a consensus approach to dealing with market infirmities. Market solutions, determined by those most affected and familiar with market problems, are always preferable to governmental and (even worse) litigation solutions. And local governmental solutions, if there are any, are preferable to federal governmental solutions. Time is indeed of the essence.

But aside from immediate news reports of Friday's order, I do not yet know what the response of market participants and governmental officials will be to Friday's order. As I explained in my written concurrence, my hope is that the Commission's directives will be immediately adopted. In particular, my fervent hope is that the State of California will take whatever actions are necessary to promote forward contracting. If California is serious about ending its electricity emergency, it will free up supply for California customers by informing willing sellers and buyers – right now – that long-term sales at reasonable, historically-justified prices are acceptable (if not preferable).

If California follows through on our suggestion, the Commission's immediate involvement is no longer needed. (The Commission still needs to act later, as promised, on issues associated with retroactive remedies, as well as pending and forthcoming requests for rehearing.) If California does not readily accept our suggestion, a number of different scenarios could ensue. If California wants to pursue discussions with market participants, it can do so, and, of course, is encouraged to do so by me and the rest of the Commission. California may wish to meet with market participants on a formal or informal basis, and might wish to meet somewhere in California or at regional sites.

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California might want the Commission to participate and to moderate as an intermediary. Then again, perhaps not.

As the Commission seemed to state unanimously last Friday, the ball is now in California's court. California should now decide how to proceed, after careful examination of Friday's comprehensive order. If, indeed, after review of the order, California should determine that it is best prepared to proceed only with the active assistance of the Commission, the Commission should honor that request. The Commission should not, however, presume that its involvement is necessary. I trust that California, acting in concert with California market participants, will take further actions, consistent with our order last Friday, that are truly in the best interests of California consumers.

Turning from timing to substance, I fail to see the value of a FERC conference in light of the Commission's decision on Friday to establish a benchmark price for wholesale bilateral contracts. I explained in my concurrence from last Friday's order that I have reservations about the benchmark. I have trouble understanding what purpose the benchmark will serve in practice. I do understand – or at least thought I did at the time – that the benchmark is a signal to the State of California to adopt its own benchmark. In adopting its benchmark, the Commission is advising California to allow wholesale suppliers and customers to lock in stable, multi-year prices for electricity without the specter of after-the-fact prudence inquiry. Again, I hope that California follows our advice.

My hesitant support for the benchmark was based on its usefulness in bringing California market participants to the table. I would not have supported the benchmark if I had known that the Commission intended to issue an order, one business day later, that forces market participants to come to the table anyway.¹

Moreover, I have difficulty reconciling today's order with a passage from Friday's order. We explained in the order (at 28-29) that forward contract issues may be resolved quickly if all affected parties "attempt to develop a mutually agreeable plan for the initial round of forward contracts." For this reason, the Commission stated its "belief that a

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conference may provide the best forum to reach agreement in the short time available, and we encourage the parties to explore these types of processes." In short, in Friday's order, the onus was on the parties to decide for themselves what "types of processes" best support the resolution of forward contract issues. I support that approach. In today's order, the Commission, without regard to its previous bipartisan and unanimous decision, now states that it has decided what process -- not surprisingly, one that places the Commission at the center -- is best suited to resolve forward contract issues. I do not support this FERC-centric approach.

¹I note that at least one other Commissioner apparently also did not expect today's conference order, coming so soon after Friday's comprehensive order. In his concurrence (at 6), Commissioner Massey expressed disappointment that the Commission was not instituting a settlement conference to help negotiate forward contracts acceptable to market participants and the State of California.

Finally, I have reservations about the Commission's choice of the phrase "settlement-type procedures" to describe its conference. This is an imprecise phrase that can mean different things to different people. My general understanding of settlement procedures contemplates proceedings that are closed to the general public and that are not on-the-record. The purpose of settlement-type secrecy is to promote a candid and frank exchange of alternatives and options. If this is what the Commission today has in mind, my concern is particularly strong. At this critical juncture, what the good people of California need most is an open and public exchange of ideas. Any back-room deal among market participants and the State of California is unlikely to win the public acceptance that is now so essential.

For all of these reasons, I dissent.

Curt L. Hébert, Jr.
Commissioner